

No. 21A834

In The
Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO, *et al.*,

Respondents.

On Application for an Extension of Time to File Petition for a Writ
of Certiorari to the United States Court of Appeals for the Sixth District

**BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR
EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

On April 29, 2022, the United States Court of Appeals for the Sixth Circuit issued a judgment against Petitioner Anthony Novak and in favor of Respondents Kevin Riley, Thomas Connor, and the City of Parma, Ohio. Petitioner has requested a 60-day extension of that deadline by application under Rule 22. Respondents oppose Petitioner’s Application. This action has been pending since September 19, 2016. The City and two police officers named personally have endured this litigation for almost six years—they deserve closure. Petitioner’s request should be denied.

I. The Underlying Judgment Involves a Straightforward Application of Well-Established Law on Qualified Immunity.

In his Application, Petitioner suggests that this case presents an important question concerning qualified immunity. Specifically, Petitioner asks whether claimed reliance on a state statute entitles police officers to qualified immunity for an arrest based on speech that is “obviously shielded by the First Amendment.” This is a misstatement of the issue. Nonetheless, this question has already been answered, and the rule of law stated by this Court has been consistently applied among the various federal appellate courts, including in the underlying judgment in this case.

This Court has repeatedly affirmed that the doctrine of qualified immunity shields officers from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known.” *E.g., Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Moreover, this Court has repeatedly admonished lower courts not to define clearly established law at a high a level of generality. *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). While a case on point is not required, existing precedent must have placed the statutory or constitutional question “beyond debate.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017). And less than a year ago, this Court re-affirmed the “beyond debate” standard in two separate cases involving qualified immunity for police officers. *See Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 6 (2021); *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 10 (2021).

Contrary to Petitioner’s assertion, the Sixth Circuit did not grant qualified immunity to the officers in this case because of any “claimed reliance on a state statute.” Instead, qualified immunity was granted based on the lack of clearly established law that would provide guidance to officers confronted with the unique facts of this case. The Sixth Circuit observed that Petitioner did more than simply mock the police department. He created a fake social media page modeled on the police department’s official page. He deleted comments on his page that attempted to warn others of the falsity of the page. And when the department tried to clarify that Petitioner’s page was a false imitation, Petitioner copied that same public warning word for word. Worse, that copied warning also contained the false representation that Petitioner’s page “is the Parma Police Department official Facebook Page.”

As the Sixth Circuit observed, whether or not the totality of Petitioner’s social

media activity was protected speech is a “difficult question.” After all, impersonation of the police is not protected speech. But the Sixth Circuit did not need to resolve that question in order to grant qualified immunity. The complexity of the question itself proves that it was not “beyond debate” that Petitioner’s arrest was unconstitutional. In fact, numerous other public officials—law directors, prosecutors, and judges—all believed there was probable cause to arrest Petitioner, reaffirming the conclusions of both the District Court and the Sixth Circuit that the issue was not “beyond debate.”

There is no “split” among the circuit courts on the application of these standards. Petitioner claims that the underlying judgment conflicts with the Fifth Circuit’s holdings. In a recent case, the Fifth Circuit held that police officers cannot invoke qualified immunity for enforcement of obviously unconstitutional statutes. *Villarreal v. City of Laredo, Texas*, 17 F.4th 532, 541 (5th Cir. 2021). But this is no different than the Sixth Circuit’s own precedent. See, e.g. *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007). In fact, the Fifth Circuit in *Villarreal* said that it was following the lead of its “sister circuits” and specifically cited the Sixth Circuit’s opinion in *Leonard*. *Villarreal*, 17 F. 4th at 541. In sum, Petitioner simply disagrees with these well-established principles.

II. Petitioner Has Not Shown Good Cause for an Extension of Time under this Court’s Rule 13.5.

Rule 13.5 expressly states that extensions of time to file a petition for a writ of certiorari are “not favored” and must be based on “good cause.” Here, the reasons given in the Application do not constitute good cause for the requested relief.

Petitioner’s basis for his requested extension of time is the retention of new counsel who (1) need to familiarize themselves with the trial and appellate records; (2) are already busy with “numerous other matters”; and (3) will be on vacation for 13 days in July. None of these reasons constitutes “good cause” to support a disfavored application to extend time to file a petition for a writ of certiorari. *See Penry v. Texas*, 515 U.S. 1304, 1304–06 (1995); *Madden v. Texas*, 498 U.S. 1301, 1304 (1991). For instance, as Justice Scalia stated in *Penry*, “counsel’s planned absences should affect neither the degree of preparation afforded a client’s case nor the orderly administration of our deadlines.”

In this case, Petitioner retained new attorneys from the Institute for Justice on May 24, 2022—just 25 days after the underlying judgment was issued by the Sixth Circuit. That afforded his new counsel 65 days (of which 41 remain as of June 17, 2022) to prepare and file a petition. That is longer than the period (30 days plus one 30-day extension generally granted) Respondents will have to prepare their response. There is still ample time remaining for them to file a timely petition for writ of certiorari on behalf of Petitioner. Petitioner does not need a total of 120 days—about five months—to prepare the petition.

Moreover, the Application does not state that Petitioner’s appellate counsel has withdrawn or is otherwise unable to help familiarize Petitioner’s new counsel with the trial and appellate records. Finally, the Application identifies three new attorneys representing Petitioner. Presumably, they are not all going on vacation at the same time. And in any case, as stated in *Penry*, their planned absences and

existing workload are not relevant to this Court's deadlines.

Qualified immunity is intended to foster prompt resolution, yet the City and two individual police officers have endured this litigation for almost six years. They deserve closure. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (“the ‘consequences’ with which we were concerned in *Harlow* are not limited to liability for money damages; they also include ‘the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.’”).

In conclusion, for the reasons stated above, Petitioner's application for additional time to file a petition for a writ of certiorari should be denied.

June 17, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, a true and correct copy of this **Brief in Opposition to Petitioner’s Application for Extension of Time to File a Petition for Writ of Certiorari** was served via overnight courier service (FedEx) and email on the following counsel of record:

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